FOURTH DIVISION
February 2, 2012

No. 1-10-1383

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 7675
	)	
ADOLFO FUENTES,	)	Honorable
	)	Victoria A. Stewart,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justices Fitzgerald Smith and Pucinski concurred in the judgment.

O R D E R

¶ 1 *HELD*: Aggravated DUI and driving while license revoked convictions affirmed on credible testimony from arresting officer; any error resulting from exclusion of opinion testimony from a lay witness was harmless; mittimus corrected.

¶ 2 Following a bench trial, defendant Adolfo Fuentes was convicted of two counts of aggravated driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(a)(2); (d)(1)(G), (d)(1)(H) (West 2008)) and one count of driving while his license was revoked (DWLR) (625 ILCS 5/6-303(D) (West 2008)), then sentenced to concurrent three year terms of imprisonment.

On appeal, defendant contends that the State failed to prove him guilty of DUI beyond a reasonable doubt, that the court committed reversible error when it excluded the opinion testimony of a lay witness as to his sobriety, and that his mittimus should be corrected to indicate one DUI conviction.

¶ 3 At trial, Chicago police officer Sonja Almazan testified that about 2:55 a.m. on November 14, 2008, she and her partner responded to a call of a traffic accident at Archer and Cicero Avenues involving defendant and another driver, Eugene Nichols. The officer observed that the streets were wet after a drizzle, Nichols' car was damaged on the driver's side and defendant's car had "substantial" front-end damage.

¶ 4 Officer Almazan further testified that she approached defendant, who had been leaning against his car, and observed that his eyes were glassy, his speech was slurred and mumbled, and he had a "moderate" odor of alcohol on his breath. Defendant told Officer Almazan that he had been driving the car, but appeared "indifferent" about the collision, could not produce a driver's license or insurance, and said "no" when asked if he would perform a field sobriety test.

¶ 5 Nichols left the scene in an ambulance and Officer Almazan transported defendant to the police station, where she observed defendant stumbling and in need of assistance to walk. Defendant initially consented to a breath test, but refused after asking whether "anything" he had taken would "show up" on the test. He told her that he had not been drinking or taking drugs, but had been to the dentist a couple of months ago and had taken Bayer aspirin about six hours earlier.

¶ 6 Officer Almazan, who had been a police officer for over 12 years, testified that she had observed over two dozen people under the influence of alcohol in her professional life and about the same number in her personal life. Based on her observations of the accident scene, defendant's "indifferent" attitude, and the odor of alcohol on him, she concluded that defendant

was under the influence of alcohol.

¶ 7 On cross-examination, Officer Almazan testified that it was "possible" that defendant was injured as a result of the collision. However, she did not observe any injuries to defendant and he did not complain of any injury.

¶ 8 Cherise Yarus testified that she had known defendant for about eight years, that defendant had gotten her and her friend, Amber Depena, jobs and that he was their supervisor at a warehouse in Bensenville. She and Depena had driven to work in defendant's car the day before the accident and rode home in it the morning of the accident. Because defendant's license was revoked, Depena drove defendant's car the distance between the warehouse and her house, with Yarus sitting in the backseat and defendant in the front passenger seat. Yarus explained that she and Depena finished their shifts at midnight and waited until 2 a.m. for defendant to finish his shift. Before driving home, she saw defendant walk, lock up the worksite and set the alarm at the warehouse. She also saw him get into the car without stumbling or falling, and did not smell alcohol on his breath at the time.

¶ 9 Thereafter, the following colloquy ensued:

> "[DEFENSE COUNSEL]: Have you - - have you ever seen people who were drunk or intoxicated in your short lifetime?
>
> [YARUS]: Yes.
>
> Q: Okay. And how many people would you say you've seen in your short lifetime that were drunk or intoxicated?
>
> A: A lot. Like ten.
>
> Q: Okay. Now, based on your experience of seeing these other people who were drunk, intoxicated, do you have an opinion as to whether or not on 2:30 a.m. on November 14th, 2008 that

[defendant] was drunk or intoxicated?

[THE STATE]: Objection.

THE COURT: Sustained.

[DEFENSE COUNSEL]: Respectfully, any lay person can give an opinion. She's entitled to give her opinion.

THE COURT: Ask another question. I've ruled.

****

[DEFENSE COUNSEL]: Now, based upon our observations of [defendant] from the time he - - you left work until you were dropped off at 2:30 in the morning, do you have an opinion as to whether he was drunk or under the influence of alcohol?

[THE STATE]: Objection

THE WITNESS: I don't think he was drinking.

THE COURT: Witness's answer is stricken. I sustained the State's objection.

****

[DEFENSE COUNSEL]: When you saw these five (sic) people who were drunk, how did they act?

THE STATE: Objection.

THE COURT: Sustained.

[DEFENSE COUNSEL]: She - - you're not permitting her to give an opinion. She has every right to give an opinion - - "

¶ 10 On cross-examination, Yarus stated that she did not see defendant during the two hours between the time she finished work and when defendant completed his shift. She became aware

of the accident a couple of days later, but did not tell police that defendant was not drinking alcohol that night.

¶ 11 After Yarus testified, defense counsel provided an offer of proof that Yarus would testify that in her opinion defendant was not under the influence of drugs or alcohol when she last saw him before the accident.

¶ 12 Defendant acknowledged that he had been driving his car at the time of the accident even though he knew his license had been revoked. However, he testified that he did not drink alcohol before the accident, that he was not under the influence at the time, and that immediately after the accident, he had no recollection of it, was confused and in shock. In addition, defendant testified that he felt cold and had trouble walking after the accident.

¶ 13 On cross-examination, defendant stated that he thinks he blacked out before the accident, but he does not have a medical condition that would cause that, and he did not request an ambulance or medical attention. When asked at the police station whether he was injured, he did not remember saying "no," but he acknowledged that he refused to take a breath test after he asked the officer if it "would show anything" that he had "taken for months."

¶ 14 After argument, the court recalled the testimony of defendant and Yarus that his speech was not slurred, his eyes were not "bloody," that he was able to walk, had been at work and had not consumed alcohol. The court also noted Officer Almazan's testimony that defendant had an odor of alcohol on his breath, his eyes were glassy, his speech was slurred, and that he was confused and indifferent.

¶ 15 The trial court then found defendant guilty of two counts of aggravated DUI (DUI while driver's license is revoked and DUI with no valid license or permit) and driving while his driver's license is revoked. Defendant now appeals from that judgment, contending first that the State failed to prove him guilty of aggravated DUI beyond a reasonable doubt where Officer Almazan's

observations regarding impairment could be explained by a potential head injury suffered when, after a long day of work and under less than ideal driving conditions, defendant struck another car.

¶ 16 The critical inquiry when reviewing a sufficiency of the evidence claim is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004), citing *Jackson v. Virginia*, 443 U.S. 307, 318 (1979). It is the responsibility of the trier of fact to fairly resolve conflicts in testimony, weigh the evidence, and draw reasonable inferences therefrom. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009). A reviewing court will not substitute its judgment for that of the trier of fact and will not set aside a conviction unless the evidence is so improbable or unsatisfactory that it raises a reasonable doubt as to defendant's guilt. *Siguenza-Brito*, 235 Ill. 2d at 224-25.

¶ 17 Initially, we observe that defendant does not raise any argument with respect to the aggravating factors which elevated the offense to a felony, or challenge the fact that he was driving at the time of the accident. Rather, he focuses on the State's responsibility to prove that he was under the influence of alcohol at the time he was in actual physical control of the vehicle. *People v. Diaz*, 377 Ill. App. 3d 339, 344 (2007). This factor may be proved by circumstantial evidence (*Diaz*, 377 Ill. App. 3d at 345), as well as the credible testimony of the arresting officer (*People v. Janik*, 127 Ill. 2d 390, 402 (1989); *People v. Sturgess*, 364 Ill. App. 3d 107, 115 (2006)). In the latter situation, an officer's testimony as to a defendant's appearance, speech, conduct, and the detection of an odor of alcohol, is relevant evidence of defendant's mental and physical impairment. *Sturgess*, 364 Ill. App. 3d at 115.

¶ 18 Here, Officer Almazan testified that defendant's walking and balance were unsure, his speech was slurred, his eyes were glassy, his demeanor was confused and indifferent, he had a

moderate odor of alcohol coming from his breath, and he was unable to produce a valid driver's license or permit. *Sturgess*, 364 Ill. App. 3d at 115. In addition, defendant refused to complete a field sobriety test and later refused a breath test after asking the officer if it would reveal "everything" he had taken in recent months. Evidence of a refusal to take the test is relevant circumstantial evidence of the driver's consciousness of guilt. *People v. Garriott*, 253 Ill. App. 3d 1048, 1052 (1993). In light of the above, we find that the State presented sufficient evidence to allow the trial court to find defendant guilty of DUI beyond a reasonable doubt. *Diaz*, 377 Ill. App. 3d at 345.

¶ 19 Defendant, nonetheless, points to inconsistencies in testimony between Officer Almazan and the defense witnesses as evidence of his innocence. In announcing the decision, the trial court specifically noted the testimony of the three witnesses, but did not make a specific factual finding as to whom it found more credible. Based on the court's finding, however, we may presume that it accepted that the testimony provided by Officer Almazan as more credible than that provided by defendant and Yarus. It is not our prerogative to substitute our judgment for that of the trial court who heard and observed the witnesses (*Siguenza-Brito*, 235 Ill. 2d at 224-25), and the record provides no basis for doing so here.

¶ 20 Defendant also proposes alternative explanations for the otherwise sufficient evidence of his intoxication presented by the State, namely a head injury and medication he had taken. He points to his loss of memory and behavior as evidence that he suffered head injuries. He also asserts that aspirin taken six hours before the accident and a trip to the dentist months earlier explain his refusal to take a breath test. These speculative explanations were obviously rejected by the trial court (*People v. Brant*, 82 Ill. App. 3d 847, 851 (1980)), and, given the cogent testimony provided by the officer, do not raise a reasonable doubt as to his guilt (*Diaz*, 377 Ill. App. 3d at 346).

¶ 21 Defendant next contends that the trial court committed reversible error when it excluded lay opinion testimony from Yarus as to his sobriety. The State responds that the court properly excluded the testimony due to the lack of foundation establishing Yarus as qualified to give such an opinion.

¶ 22 The parties recognize that lay persons may express their opinion on the question of intoxication, provided their opinion is based on their personal observation of, and experience with, intoxication. *People v. Bowman*, 357 Ill. App. 3d 290, 299-300 (2005). The decision as to whether evidence is relevant and admissible rests with the trial court and that decision will not be disturbed absent a clear abuse of discretion that results in prejudice to defendant. *Bowman*, 357 Ill. App. 3d at 300.

¶ 23 Here, we need not reach the question of whether the court abused its discretion in disallowing her opinion testimony where the record clearly shows that there is no reasonable probability that the trial court would have acquitted defendant had the excluded lay opinion testimony been admitted. *People v. Nevitt*, 135 Ill. 2d 423, 447 (1990). Yarus was permitted to testify to her observations of defendant about an hour before the accident walking to the car after closing up the warehouse and setting the alarm, and doing so without stumbling. Yarus further testified that she did not see defendant drink alcohol, he did not smell of alcohol, and she did not see any alcohol in the car.

¶ 24 Defense counsel also provided an offer of proof that Yarus would testify that she did not believe that defendant was intoxicated. This conclusion was clearly apparent from her testimony, which was heard by the trial court and specifically contrasted with the testimony of the State's witness, before the court announced its decision. Under these circumstances, the proposed opinion testimony from Yarus would effectively be cumulative and given the overwhelming nature of the credible testimony provided by Officer Almazan, the trial court would not have

acquitted defendant if Yarus had been permitted to testify as to her opinion of his sobriety. We, therefore, find that any potential error stemming from the exclusion of this testimony was harmless. *People v. Fair*, 159 Ill. 2d 51, 87 (1994).

¶ 25 Defendant finally contends, and the State concedes, that the mittimus should be corrected to reflect only one conviction for aggravated DUI. We agree with the parties that both convictions stem from the same physical act and should therefore merge under the one act, one crime rule. *People v. Gordon*, 378 Ill. App. 3d 626, 642 (2007). Accordingly, we order the mittimus corrected to reflect a single conviction of aggravated DUI under count 1; defendant's conviction of DWLR (count 3) remains unaffected (*People v. Nunez*, 236 Ill. 2d 488, 499 (2010)).

¶ 26 We, therefore, affirm the judgment of the circuit court of Cook County and order the mittimus corrected.

¶ 27 Affirmed; mittimus corrected.